

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

MATEEN ABDUL-AZIZ,

Petitioner,

v.

Civil Action No. 1:05CV86
(Criminal Action No. 1:03CR39-01)

UNITED STATES OF AMERICA,

(STAMP)

Respondent.

MEMORANDUM OPINION AND ORDER
AFFIRMING AND ADOPTING REPORT AND
RECOMMENDATION OF MAGISTRATE JUDGE

I. Procedural History

On May 27, 2005, pro se petitioner Mateen Abdul-Aziz filed a motion under 28 U.S.C. § 2255 to vacate, set aside or correct a sentence by a person in federal custody. Contemporaneously, the petitioner filed a motion requesting evidentiary hearing and appointment of counsel. The matter was referred to United States Magistrate Judge John S. Kaull for initial review and report and recommendation pursuant to Local Rule of Prisoner Litigation Procedure 83.15. Following an order directing the respondent to file a response to the petition, the respondent filed a response and the petitioner filed a reply.

On May 6, 2008, Magistrate Judge Kaull issued a report recommending that the petitioner's § 2255 application be denied as to all grounds, except as to the petitioner's contention that he received ineffective assistance of counsel because his attorney failed to file an appeal of the petitioner's sentence after the

petitioner instructed him to do so. The magistrate judge informed the parties that if they objected to any portion of the report, they must file written objections within ten days after being served with copies of the report. The time for objections has now passed and no objections have been filed to date.

II. Standard of Review

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court must conduct a de novo review of any portion of the magistrate judge's recommendation to which objection is timely made. As to those portions of a recommendation to which no objection is made, a magistrate judge's findings and recommendation will be upheld unless they are "clearly erroneous." See Webb v. Califano, 468 F. Supp. 825 (E.D. Cal. 1979). Because the petitioner did not file objections, this Court reviews the report and recommendation for clear error.

III. Discussion

This Court finds no clear error in the report and recommendation of the magistrate judge that grounds one, two and three of the petition must be denied with prejudice. The petitioner failed to set forth any sufficient evidence that his counsel was ineffective in the manners alleged in ground one of the petition. Further, the petitioner's contention that his guilty plea was involuntarily made and that the sentencing court failed to abide by the terms of the plea agreement, grounds two and three

respectively, are wholly without merit. Additionally, this Court finds no clear error in the magistrate judge's recommendation to grant the petitioner's request to withdraw grounds five and six of his petition and to dismiss those claims.

Finally, the magistrate judge's recommendation that the petitioner's Motion Requesting Evidentiary Hearing and Appointment of Counsel as to ground four of the petition be granted is not clearly erroneous. Because the record does not conclusively establish whether the petitioner asked his attorney to file an appeal and whether counsel ignored such instructions, an evidentiary hearing is necessary. Accordingly, the parties are DIRECTED to appear for an evidentiary hearing on ground four of the petition before the undersigned judge on August 11, 2008 at 1:15 p.m. in the South Courtroom at the Wheeling point of holding court.

IV. Conclusion

This Court finds that the magistrate judge's recommendation is not clearly erroneous and hereby AFFIRMS and ADOPTS the report and recommendation of the magistrate judge in its entirety. Accordingly, the petitioner's Motion Requesting Evidentiary Hearing and Appointment of Counsel is GRANTED, and the petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 is DENIED as to grounds one, two, three, five and six. This Court defers ruling on ground four pending an evidentiary hearing.

Finally, this Court finds that the petitioner was properly advised by the magistrate judge that failure to timely object to the report and recommendation in this action will result in a waiver of appellate rights. Because the petitioner has failed to object, he has waived his right to seek appellate review of this matter. See Wright v. Collins, 766 F.2d 841, 844-45 (4th Cir. 1985).

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit a copy of this memorandum opinion and order to the pro se petitioner, to counsel of record herein and to the Office of the Federal Public Defender. Upon receipt of this order, the Federal Public Defender is DIRECTED to submit a proposed order of appointment.

DATED: July 10, 2008

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE